DATE: August 4, 1995
CASE NO. 90-ERA-30

IN THE MATTER OF

MARVIN B. HOBBY,

COMPLAINANT,

v.

GEORGIA POWER COMPANY,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

DECISION AND REMAND ORDER

This proceeding arises under the whistleblower provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1988), and is before me for review of a Recommended Decision and Order (R. D. and O.) issued by the Administrative Law Judge (ALJ) on November 8, 1991. *See* 29 C.F.R. § 24.6(b) (1994). The ALJ recommends dismissal of the entire complaint. I disagree and remand for the ALJ to determine a complete remedy.

BACKGROUND

Complainant, who has "unsurpassed" knowledge of the nuclear industry, was employed by Respondent in 1985 as the Assistant to the President. Complainant's Exhibits (CX) 2, 7.[1] Complainant held one of the highest non-officer positions in the company. In 1987, with Complainant's support and cooperation, Respondent proposed to its owner, the Southern Company, that a central nuclear operating company be established. Transcript (T.) at 62-64. The operating company, the Southern Nuclear Operating Company (SONOPCO), would serve as a pool of talent from the various companies within the Southern Company with a single

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purpose and single focus, *i.e.*, the safe and efficient operation of all its nuclear plants. T. at 306.[2] The Southern Company agreed with the idea and filed an application with the Securities and Exchange Commission for incorporation of SONOPCO in June of 1988. T. at 79. The incorporation was

halted, however, when one of Respondent's joint owners, Oglethorpe Power Corporation, filed a petition for intervention. T. at 80-81.[3] At the time of the hearing, Oglethorpe's intervention had continued to prevent the incorporation of SONOPCO. T. at 305, 405.

During 1988 Respondent's nuclear operations department underwent numerous personnel changes and reorganizations. T. at 73, 78. Complainant assumed several different positions in a brief period. In April of 1988, R.P. McDonald was named as Respondent's new Executive Vice-President of Nuclear Operations. T. at 72. McDonald is also Executive Vice-President of Nuclear Operations at Alabama Power. T. at 601-604. Bill Dahlberg became Respondent's new President in June 1988. T. at 84.

Although the incorporation of SONOPCO was delayed, the Southern Company proceeded with the SONOPCO "project" as a division of the company. T. at 305. In November 1988, the Southern Company moved or collocated all of the nuclear operations in its system to the SONOPCO project in Birmingham, Alabama. T. at 82. Joe Farley, Executive Vice-President of the Southern Company, was placed in charge of the SONOPCO project. T. at 308. McDonald also worked in Birmingham as part of the SONOPCO project and was responsible for operating Respondent's and Alabama Power's nuclear plants. Complainant was offered a position with SONOPCO, both in November and June of 1988, but he declined because he preferred to remain with Respondent's executive department in Atlanta. T. at 83, 85.

By memorandum dated December 27, 1988, Respondent created the Nuclear Operations Contract Administration (NOCA) "to interface with [its] nuclear operations group in Birmingham." CX 8. Complainant was named the general manager of NOCA and began reporting to George Head. After Head retired in April 1989, Complainant reported to Carey Adams, who reported to Grady Baker, Respondent's Senior Executive Vice-President. T. at 215, 466.

During 1989 Complainant was directly involved in negotiating contracts with Oglethorpe Power. T. at 405-406. He worked closely on several projects with Dan Smith, Oglethorpe's project director. T. at 830, 858. Fred Williams, Respondent's Vice-President of Bulk Power, was primarily responsible for the negotiations, and he had continual contact with Complainant throughout 1989. T. at 406.

On January 1, 1990, Williams made a formal recommendation to eliminate Complainant's position, T. at 411, though he previously had discussed the issue with Baker and Dwight Evans, Respondent's

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Executive Vice-President for External Affairs. T. at 407, 412. Evans made the ultimate decision. T. at 369-71. Earlier, however, on November 7, 1989, Respondent's Management Council had met and discussed Complainant's future with the company. T. at 346, 705.

In late November 1989, Complainant heard from Smith that he, Complainant, was going to be removed from his job. Complainant confronted Williams and Williams confirmed that the information was true. T. at 189, 425-27. Williams and Complainant began to negotiate concerning the terms of his removal. Thomas Boren, Respondent's Senior Vice-President of Administration, assisted

Williams in negotiating within company guidelines. T. at 431, 486. Eventually, on January 25, 1990, Respondent offered Complainant a financial out-package, but because Complainant did not respond to the offer within the time afforded, Respondent eliminated his job on February 2, 1990. T. at 206-208. Complainant was then offered the standard out-package for an "impacted" employee. T. at 208. He remained at the company until about February 23, 1990. T. at 275.

In the interim, Complainant was moved from his Level 20 office to a much smaller Level 12 office that contained storage boxes and a broken credenza. T. at 211-12. Williams also ordered Complainant to turn in his employee badge and his gate opener to the executive parking garage. In addition, Williams limited Complainant's access to only four floors of the building. T. at 217. Complainant filed this ERA complaint on February 6, 1990, T. at 210, and then amended it on February 28, 1990.

ALLEGATIONS

Complainant alleges that he engaged in two forms of protected activity which led to Respondent's decision to eliminate his job. The first occurred on January 2, 1989, during a pre-hearing meeting concerning another ERA case, *Fuchko v. Georgia Power Co.*, Case Nos. 89-ERA-9, 10. Several lawyers from the same law firm that is representing Respondent in this action conducted the meeting to prepare potential witnesses to testify on behalf of Respondent. Both Complainant and McDonald, who was the alleged discriminating official in the *Fuchko* case, attended. T. at 722. During the meeting the attorneys gave each prospective witness an outline of the testimony they expected to elicit from the witness. Complainant alleges that he openly objected to his outline of testimony as containing untruths, and that he and McDonald clashed over the change in the proposed testimony. He also alleges that one of the attorneys attempted to suborn perjury from him, but that he refused.

The second alleged protected activity centers around a memo, dated April 27, 1989, which Complainant submitted to Williams. Respondent's Exhibit (RX) 18, Tab 3. The memo raised numerous

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concerns and problems Complainant had been encountering in doing his job as manager of NOCA. One of the concerns was that Respondent might be in violation of its Nuclear Regulatory Commission (NRC) license because McDonald was taking management direction from Farley, the chief executive of the SONOPCO project, rather than from Dahlberg, Respondent's president.

Complainant also alleges that Respondent's decisions to revoke his office and parking privileges were retaliatory. Complainant contends that Respondent took these actions because it knew he was about to contact the NRC or file this complaint.

Respondent contends that Complainant did not engage in protected activity but even if he did, that activity was not the reason for its actions. Williams testified that after observing the operation of NOCA and SONOPCO, he concluded there was no need for a high level manager at NOCA, or even a separate organization apart from the SONOPCO project. T. at 408, 412. Evans agreed that the position was unneeded. T. at 370. Williams also testified that after the termination decision, he moved Complainant up to the floor on which his office was located and limited Complainant's parking and access privileges, essentially for nuclear safety reasons. T. at 435-36.

DISCUSSION

As a preliminary matter the ALJ found that Respondent had waived its argument that the complaint was untimely filed. R. D. and O. at 44-45. I agree. The time frame for filing a complaint under the ERA is not jurisdictional, but is a statute of limitations, generally considered an affirmative defense. *See Lastre v. Veterans Administration*, Case No. 87-ERA-42, Sec. Dec., Mar. 31, 1988, slip op. at 3. *See also School Dist. of City of Allentown v. Marshall*, 657 F.2d 16, 19 (3d Cir. 1981); *Hicks v. Colonial Motor Freight Lines*, Case No. 84-STA-20, Sec. Dec., Dec. 10, 1985, slip op. at 7. At Respondent's request, the ALJ ordered the parties to submit a statement of contentions
prior to the hearing. In addition, he held a pre-hearing conference on October 16, 1990. *See* Transcript dated October 16, 1990, at 3-5; Motion dated September 27, 1990. The issue of timeliness was not mentioned in either the pre-hearing statement or the conference. Nor was it raised in Respondent's pre-hearing brief, filed October 19, 1990. Respondent raised the issue for the first time in its post-hearing brief. Had Complainant expected Respondent's defense, he might have presented his evidence differently. Since the ALJ ordered the parties to narrow the issues in preparation for the hearing, and Respondent failed even to intimate the statute of limitations defense, the ALJ did not err in ruling against Respondent on that issue. *See* 29 C.F.R. § 18.6(d)(2)(v) (1994). This ruling is also consistent with those made under analogous circumstances pursuant to Rule 8(c) of the Federal

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Rules of Civil Procedure. *Johnson v. Sullivan*, 922 F.2d 346, 355 (7th Cir. 1990); *Paetz v. United States*, 795 F.2d 1533, 1536 (11th Cir. 1986) (statute of limitations defense is waived when not raised in pleadings).[4]

Turning to the merits, the ALJ concluded that Complainant failed to establish a *prima facie* case of retaliatory discharge or other adverse action. Considering the posture of this case and the magnitude of the record, I will not belabor the question of whether Complainant established a *prima facie* case. *See Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-0046, Sec. Dec., Feb. 15, 1995, slip op. at 11-12, *appeal filed*, No. 95-1729 (8th Cir. Mar. 27, 1995). Respondent articulated legitimate, nondiscriminatory reasons for removing Complainant from his job as manager of NOCA and modifying his office and parking privileges. Thus, the question becomes whether Complainant proved by a preponderance of the evidence that Respondent retaliated against him for engaging in activity protected by the ERA's whistleblower provision. *Id.*[5] While the ALJ proceeded in the analysis and reached an alternative, ultimate conclusion that Respondent was not motivated in whole or in part by any protected activity, R. D. and O. at 54, that conclusion is not supported by the evidence. After thoroughly reviewing the entire record before the ALJ, I find that Complainant met his burden of proof on the ultimate issue and thus, as logic dictates, also presented a prima facie case. *See St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2756 (1993).

The January 2 pre-hearing meeting

The ALJ concluded that "[n]othing said at the [January 2 pre-hearing] meeting either by or to the Complainant constituted protected activity." R. D. and O. at 51. He found Complainant's accusation that one of Respondent's attorneys attempted to suborn perjury during the meeting "totally unbelievable." R. D. and O. at 40. Alternatively, finding no evidence that Respondent was aware of the alleged protected activity, the ALJ concluded that a causal connection had not been established. R. D. and O. at 52.

I disagree with the ALJ's ruling that Complainant did not engage in protected activity at the January 2 meeting. Under Title VII of the Civil Rights Act of 1964, it has been held that an employee's refusal to assist a respondent employer in the preparation of its defense of a discrimination claim is protected activity. *Smith v. Columbus Metro. Hous. Auth.*, 443 F. Supp. 61, 64 (S.D. Ohio 1977). The court explained that when an employee is approached on an informal, *ex parte* basis by one of the parties to such a proceeding and is asked to relate personal knowledge concerning the subject matter of the charge, the employee's decision whether to cooperate is one that affects his participation in the pending case. "Whether an employee agrees

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or refuses to cooperate, his participation in the pending Title VII investigation and proceeding has begun." *Id.* The employer may not then retaliate against the employee because of the employee's decision not to participate in the manner the employer desired. *See also Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 959-60 (D.C. Cir. 1984) (employee's refusal to agree to provide investigators with testimony that employer desired but employee believed to be false is protected under FMSHA).

Here, Complainant attended the pre-hearing session as a prospective witness and in effect refused to testify to facts contained in the outline of proposed testimony which he believed were false. T. at 770. Contrary to Respondent's argument, the changes insisted upon by Complainant were not "consistent" with Respondent's defense.[6] In the end, Complainant was not called to testify, and Respondent settled the case shortly after the hearing began. T. at 762. These facts alone are sufficient to show that Complainant engaged in a protected refusal to cooperate in Respondent's defense.

I agree that there is no evidence that any of the managers or executives who were directly involved in the decision to terminate Complainant participated in the January 2 pre-hearing meeting or were aware of Complainant's January 2 protected activity. McDonald, however, was aware of that protected activity. He overheard at least some of Complainant's remarks during the meeting. T. at 721-22. I find it likely that counsel, in preparing McDonald for the *Fuchko* hearing, fully explained the factual discrepancies to him.

I have carefully considered Complainant's theory that because of animus for the January 2 protected activity, McDonald interfered with Complainant's job and Respondent's assessment of his worth to the company, thereby contributing to Respondent's decision to eliminate his job. Like the ALJ, I do not doubt that

McDonald "interfered" with Complainant's ability to do his job as manager of NOCA. R. D. and O. at 41. There is ample evidence of McDonald's lack of cooperation under various circumstances. *See, e.g.*, T. at 132-35, 337, 454, 651-52; Deposition of H.G. Baker, Jr. at 54. McDonald's interference in Complainant's job, however, was not motivated by Complainant's January 2 protected activities. In making this finding I rely on Complainant's testimony regarding an incident that occurred the next day, as corroborated by a letter Complainant wrote to his mentor, Admiral Dennis Wilkerson, on June 8, 1989. CX 22.

Complainant testified that on January 3, he met with McDonald concerning a new work assignment. T. at 104. At the outset of the meeting Complainant casually informed McDonald that he would be happy to take the assignment, but he first would have to check with his new boss, George Head. According to

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Complainant, McDonald became "livid" and asked Complainant what he was talking about. CX 22. Complainant showed him the memo creating NOCA and naming Complainant general manager under Head. McDonald got very mad and said he opposed the creation of such a group. McDonald told Complainant, "[d]on't have any part of that, I'm not going to have any part of it. If I decide that job is necessary or is needed in the future, I will pick the people who head it up. Don't you get involved with that." T. at 105.

There is no evidence contradicting the ALJ's finding that the January 3 meeting between Complainant and McDonald began amicably. R. D. and O. at 41. Had there been a hostile "clash" at the pre-hearing meeting on January 2, as Complainant alleges, the January 3 meeting would not have begun so affably.[7] Rather, during the course of the January 3 meeting, McDonald discovered that NOCA had been created and he strongly disapproved. Although Complainant described the January 3 incident and his thoughts about it in detail to Admiral Wilkerson on June 8, he did not mention the January 2 pre-hearing meeting. CX 22.

McDonald's hostile reaction to the news of NOCA on January 3 is more consistent with other evidence that he instituted a new philosophy of nuclear operations when he came to Georgia Power in April 1988. His predecessor believed in strong corporate oversight; McDonald believed in no corporate oversight. T. at 76. McDonald did not want any nuclear experience in Atlanta and had effected many changes in keeping with that philosophy. T. at 76-77. Thus, while McDonald was uncooperative and, in fact, took steps that proved to be detrimental to Complainant's employment, I am not convinced that Complainant's January 2 protected activity motivated his actions. Furthermore, even if the managers who were more directly involved in the termination decision were aware of Complainant's January 2 protected activity, there is insufficient proof that it motivated their decision.[8] Complainant engaged in other protected activity, however, that did motivate Respondent's decision to terminate him.

The April 27 memo

The ALJ reluctantly found that in his April 27 memo, Complainant raised protected concerns about the reporting structure between SONOPCO and Respondent. R. D. and O. at 42,

52. I definitively hold that he did. Because McDonald was refusing to cooperate with NOCA, an organization created and supported by President Dahlberg, Complainant became concerned that Dahlberg actually had no control over McDonald. Complainant drew this inference because "[p]roblems occurred, were brought to the president's attention, and the president did not seem to be able to straighten out the problems." T. at 240, 243; *see also* T. at 652. Even Respondent's counsel recognized that Complainant

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sought to get an adequate answer to the "rhetorical question about why doesn't Bill Dahlberg just pick up the phone and tell McDonald what to do." T. at 240.

Complainant's concerns were validated by Smith. Complainant was well aware that Smith and Oglethorpe Power had begun to question whether Respondent's reporting structure was in violation of the NRC license. Smith had raised the issue with Complainant several times in early 1989. By March 30, Smith was "very upset," and in an April 19 joint committee meeting Smith officially raised the issue and requested an organizational chart for the SONOPCO project. T. at 136-39, 851-54. Although Complainant tried to defend Respondent's reporting structure, by that time Complainant too had begun to question the lines of authority. In his April 27 memo, Complainant described specific examples of McDonald's antics, and added, "I am not a lawyer or licensing specialist but I believe both will tell you that it is essential that GPC [Georgia Power Company] and APC [Alabama Power Company] be in control of these plants. . . . [If McDonald does not receive his management direction from Dahlberg] . . . we are in violation of our license and could experience significant repercussions from the NRC -- including the revocation of the licenses." RX 18, Tab 3. Complainant added that a Region II NRC employee had suggested that the NRC was so concerned that they might seek to place a resident inspector in Birmingham "to see what was going on." *Id.*

Respondent argues that Complainant's concern about Respondent's compliance with its NRC license and regulations governing the reporting structure is a purely internal complaint not covered under the ERA. Recently, the United States Court of Appeals for the Eleventh Circuit, which has appellate jurisdiction of this case, endorsed the Secretary's longstanding position that internal complaints are protected. *Bechtel Const. Co. v. Secretary of Labor*, 50 F.3d 926, 931-33 (11th Cir. 1995). Complainant's concern also is "grounded in conditions constituting a reasonably perceived violation" of the ERA. 42 U.S.C. § 5851(a)(1); *DeCresci v. Lukens Steel Co.*, Case No. 87-ERA-13, Sec. Dec., Dec. 16, 1993, slip op. at 5, and cases cited therein; *see also Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, Sec. Dec., Jan. 25, 1994, slip op. at 8-9. Whistleblowers are protected under the ERA to further the Congressional purpose of protecting the public from the hazards of nuclear power and radioactive materials. Complainant's concern about whether Respondent's president actually was in control of Respondent's nuclear power plants, as prescribed by the NRC license, implicates the safe operation of the plants. *See also* RX 19 (organizational hierarchy

described in Final Safety Analysis Report submitted to NRC). Extending coverage to Complainant's

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concern is, therefore, consistent with the purpose of the Act.[9] Respondent's testimony that Complainant's perception of the reporting structure was wrong does not render Complainant's concern unprotected. An employee's reasonable belief that his employer is violating the Act may form the basis for a retaliation claim irrespective of after-the-fact determinations regarding the correctness of the employee's belief. *Minard*, slip op. at 22, 24; *see Dodd v. Polysar Latex*, Case No. 88-SWD-0004, Sec. Dec., Sept. 22, 1994, slip op. at 9. Complainant's suspicion that a violation existed was shared at least by Smith, and was reasonable considering McDonald's behavior within the organizational structures.[10]

The ALJ concluded that the decision to eliminate Complainant's position was not based in whole or in part on Complainant's protected activity, but was based on Respondent's business judgment that the position was not needed. R. D. and O. at 53-54. He credited the testimony of Williams and Evans as the principal decisionmakers and discounted the significance of Respondent's November 7 meeting. He relied primarily on the following findings: (1) that over six months had passed since the April 27 memo and that the time frame for oral complaints about the reporting issue is not established in the record; (2) that Williams objected only to the "complaining" style of the April 27 memo; (3) that none of the witnesses who participated in the November 7 council meeting acknowledged knowing of the April 27 memo; (4) that the council members' low opinion of Complainant's performance was no surprise; (5) that many of the executives previously had expressed reservations about the necessity of NOCA; (6) that the incorporation of SONOPCO had been delayed beyond expectations; and (7) that at the time Complainant's position was eliminated, other positions were being eliminated as cost-saving measures. *See* R. D. and O. at 42-44, 52. The ALJ's findings ignore significant and conflicting evidence, and cannot be upheld.

The council members in effect decided to terminate Complainant's employment during the November 7 meeting. Baker ultimately conceded that they decided to eliminate the position at that time. T. at 702-704. While Williams and several other witnesses testified that the position was eliminated because it had no function, T. at 408, 312, the November 7 decision was made irrespective of whether Complainant's position had a function. As illustrated by the evidence outlined below, the council's decision was more personal and more final. Williams and Evans simply provided Respondent with a post-hoc explanation for implementing the November 7 decision. T. at 708-709.[11]

Various witnesses who attended the November 7 meeting testified that the focus of the meeting was "people," not any

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particular job. Dahlberg testified that the subject of the meeting was people -- their performance and potential. T. at 346. Baker testified that "the major issue was whether or not the individual involved could contribute to the company, as

whether they had the abilities and management abilities that we needed and required . . . ." T. at 680. Boren described the meeting in detail, as follows:

> The purpose was several things, but the primary purpose was to look at leadership.
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> The Southern system, of which Georgia Power is a big part, was going through the process of looking at how do we ensure that we have the right number and quantity and type of leaders in the pipeline so to speak for the next decade, and one of the challenges they had issued to Mr. Dahlberg was to look at people we had coming up through the ranks and make sure we identified those leaders, looked at their potential and were basically trying to develop that.
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> Also at the same time Mr. Dahlberg was doing some team building with us as well.
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> * * * *
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> Each of us stood up before the rest of the members of the management council, and we would list the individuals that reported directly to us, and then before anybody else commented on them we would sit down and identify what we thought their performance was from a rating of zero to four, zero being the lowest, four being the highest, and what we thought their potential was, and that basically went from zero to three I think, zero being peaked out, no further potential, one being could move one more level, two being could move two more levels.
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> In that particular assessment Mr. Hobby had three what we call double zeros, three two zeros and one one-zero. In other words, in terms of potential everyone rated him as having no further potential.
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> In terms of performance, three out of the seven people rated him at the lowest level possible, that's zero; one person rated him at one, and . . . four people rated him at level 2 which was basically about average.

T. at 483-84.[12] In sum, Baker explained that the council determined that Complainant was not a valuable asset to the company. T. at 708. He also responded affirmatively to counsel's inquiry that there was "no place in Georgia Power for Marvin Hobby." T. at 705.

These assessments, particularly those concerning Complainant's "management ability" and leadership ability, are wholly unrelated to whether his position had a function. There is no evidence that Respondent ever criticized Complainant's management skills except in connection with the April 27 memo. As discussed below, that criticism was based on the protected

complaint raised in the memo, not on the memo's "complaining style." Furthermore, Williams and Evans, who purported to be the principal decisionmakers, testified emphatically that Complainant's work performance was *not* a factor in the decision to eliminate his job. T. at 413, 370. These and numerous other contradictions in Respondent's explanation are persuasive evidence of pretext. *See Bechtel Const. Co.*, 50 F.3d at 935. (pretext demonstrated by employer's shifting explanations).

Baker implied that he never had a high opinion of Complainant's communication or interface skills. T. at 700. He also claimed that placing Complainant as manager of NOCA "was an experiment to see if in fact Mr. Hobby could produce something that was of value to the company." T. at 701. Contrary to the ALJ's finding, these remarks and Baker's other derogatory comments *are* surprising because on December 14, 1988, he, as "Rater (Immediate Supervisor)," gave Complainant a "commendable" performance evaluation; considered his knowledge of the industry "unsurpassed;" and indicated there was growth potential. CX 7. In the year before, Baker rated Complainant's performance as "excellent" and "commendable" and wrote that there was "no known limit" to Complainant's future growth possibilities with Respondent. CX 4. I find no legitimate, nondiscriminatory reason for Baker's change of opinion. Williams, who more closely observed Complainant's performance during the spring and fall of 1989, had no complaints about Complainant's performance and admitted that Complainant and Smith went "a long way in finalizing" the managing board agreement. T. at 464. Baker, on the other hand, opined that nothing was accomplished by the discussions between Complainant and Smith. T. at 685.

Even if Baker "didn't really have a strong feeling that [NOCA was needed] to start with," T. at 688, and even if Respondent had decided that it made a mistake in creating NOCA, these also are not bases for suddenly concluding that Complainant's performance and potential were "zero." The drastic, inadequately explained change in Respondent's perception of Complainant's work performance is further evidence of pretext.

Nor does the delay in SONOPCO's incorporation justify Respondent's explanation of "no function." Williams testified that the incorporation and contract issues were not significant to his decision. T. at 407. Moreover, Dahlberg created NOCA to perform work beyond contract administration. T. at 328.[13]

There is another significant reason why Respondent's explanation of "no function" is not credible. It is undisputed that on January 25, after Respondent had removed Complainant from his job, Williams assigned another one of his managers, Bill Smith, to take responsibility for Complainant's activities. Williams ordered Complainant to turn over his files to Smith. T. at 207. Since Respondent appointed a replacement, a function necessarily existed.[14]

The December 27, 1988, memo creating NOCA and naming Complainant as manager, states:

> It is important for us to realize that while our nuclear operations may be managed in Birmingham and

> ultimately will be managed by a separate Southern subsidiary, Georgia Power will be held accountable by our regulatory groups, our stockholders, and the public for the operation and performance of our nuclear units. It is essential that Georgia Power Company be involved in the operations of our units, monitor their performance and integrate nuclear operations goals, accountabilities, and financial planning into Georgia Power Corporate Plan.

RX 18, Tab 2. These statements not only show that there was a legitimate function to be performed by an organization separate from SONOPCO, but they reveal that Complainant's protected complaint about the reporting structure also was implicit in his complaints about McDonald's lack of cooperation with NOCA. Baker's criticism of Complainant's complaints about lack of cooperation from McDonald is, therefore, based on and tantamount to criticism of Complainant's protected activity. *See* T. at 699-700.

Respondent decided to remove Complainant from the "pipeline" to silence these ongoing complaints about the reporting structure. Contrary to the ALJ's findings regarding the timing of the complaints, R. D. and O. at 43, 49, 52, Evans indicates that Complainant raised the reporting structure issue with him in August 1989, just over two months before the council's November 7 decision. *See* T. at 395-96. This time frame is confirmed by Complainant's testimony, T. at 169-71, and is documented by another memo that Complainant prepared on August 14, 1989. CX 23 at 5-1. Boren testified that Complainant raised the reporting concerns with him in "late 1989." T. at 494-95.[15] Thus,

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Complainant was raising his protected complaint with the council members within several months of the adverse action. The ALJ's analysis relying on the passage of six months as a factor militating against causation is, therefore, flawed. The two to three month period of time at issue here is supportive of a causal link, particularly considering that Respondent, as a very large company, likely requires more time to effectuate important personnel decisions. *Carroll*, slip op. at 14-15.

All of the witnesses who attended the November 7 meeting -- Dahlberg, Boren, Evans and Baker -- had knowledge of Complainant's protected reporting concern. *See, e.g.*, T. at 395, 418, 471-72, 483, 494, 682. Although Dahlberg and Baker denied it, T. at 316, 683, I discredit their testimony. Williams admitted that he, at least, informed them of some of the concerns raised in the April 27 memo, which inherently would have included Complainant's accusations of wrongdoing and predictions of NRC intervention as a corollary to McDonald's lack of cooperation with NOCA. Complainant's protected concern and his complaints about McDonald's lack of cooperation are interrelated. *Supra* at 22-23. Further, it is uncontroverted that Complainant discussed the problems and showed his April 27 memo to Adams, who responded, "'[t]his is a mess.'" T. at 164.

While Williams may have viewed the April 27 memo as a set of "gripes," T. at 418, he objected to its "inaccuracies" about the reporting structure. T. at 415. He disapproved of "writing a

bunch of memos" to resolve problems. T. at 416. I conclude that Williams feared that the memo, detailing and documenting Complainant's problems with McDonald's interference and warning Respondent about the potential regulatory violation, would validate Smith's concerns or garner new ones by Oglethorpe. "[T]he co-owners were very interested in our relationship with SONOPCO since they owned a large portion of the nuclear facilities . . . ." T. at 441. Oglethorpe already was holding Respondent "hostage." T. at 461. Williams admitted that he counseled Complainant about "writing a lot of memos that were inaccurate and more of a frustration and accusing people, if we did have a litigation we would look kind of stupid having stuff like that in." T. at 422. The undisputed fact that the subject of "litigation" came up is telling. Williams' reaction that the memo would implicate Respondent in wrongdoing is also documented in Complainant's June 8 letter to Admiral Wilkerson and confirmed by Wilkerson's testimony. CX 22; T. at 555.

Williams considered the April 27 memo significant because within the next few days he either showed it to Dahlberg or told him about it, T. at 418, and also told one of Respondent's attorneys about the memo. T. at 778. Complainant's telephone log prepared on April 28 documents that the attorney was "worried

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about [the] memo." CX 12.

On May 5, Dahlberg, Baker, and Farley met to discuss the relationship between Respondent and SONOPCO and the status of negotiations with Oglethorpe. T. at 681, 318. There is no evidence that Respondent contemplated removing Complainant from his position until that meeting. Williams had been "very open-minded" about NOCA in the spring. T. at 408. Respondent claims that it asked Farley to take Complainant into SONOPCO during the May 5 meeting. T. at 682, 586. I find Respondent's request disingenuous considering that Complainant had declined employment with SONOPCO on two prior occasions in 1988. T. at 82-83. This evidence only marks the point at which Respondent began to contemplate removing Complainant from the "pipeline."[16]

Williams' testimony that he offered Complainant other positions in lieu of termination does not convince me that Respondent had not already decided to remove Complainant from the "pipeline" for retaliatory reasons. The offers were hollow and unauthorized. Evans admitted that in deciding to eliminate Complainant's job as manager of NOCA, "whether there were [other] jobs available or not was not even discussed." T. at 392-93. After all, there was "no place in Georgia Power" for Complainant. T. at 705. In any event, the alleged offers were not for comparable employment, to which Complainant is now entitled as a remedy for Respondent's unlawful retaliation. *See Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983).

While I find that Respondent's decision to terminate Complainant was based solely on retaliatory animus, even if Respondent's decision was based on "mixed motives," *i.e.*, a mixture of legitimate and illegitimate motives, the outcome of this case would be the same. Respondent did not prove that it would have terminated Complainant even if it had not allowed

Complainant's protected concerns about the reporting structure to play a role in its decision. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45 (1989).

The ERA complaint

Assuming that the parking and access changes were adverse actions, the ALJ again found no *prima facie* case that these actions were taken in retaliation for Complainant's filing this ERA complaint. He explained that Williams, who changed Complainant's office, had no knowledge of the complaint since it was filed after the office change, and the changes in Complainant's parking privileges and building access were based on reasonable security concerns, not the filing of this complaint. R. D. and O. at 44, 53.

I disagree. Respondent's decisions adversely affected the

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privileges of Complainant's employment, *see, e.g., Bassett v. Niagara Mohawk Power Corp.*, Case No. 86-ERA-2, Sec. Dec., Sept. 28, 1993, slip op. at 14, and were motivated at least in part by Complainant's protected activity. Complainant filed this ERA claim on February 6 and his office was moved thereafter, on February 9. T. at 210; RX 18, Tab 12. His parking and access privileges were changed on February 19. T. at 217.

Williams tied the two actions together, claiming that he moved Complainant to the 19th floor where his office is located and changed Complainant's parking privileges after he discovered that Complainant was shredding documents and bringing unrecognized individuals into the parking garage. T. at 436. Boren testified, however, that he was involved in these decisions and that he thought it was "prudent management from looking at a

potential labor problem here to make sure [he] knew who went and who came." T. at 497.

I find that the potential labor problem Boren referred to was this ERA complaint. Complainant was dissatisfied with the out-package negotiations and had employed counsel to assist him. *See* Letter to Dahlberg from Michael D. Kohn, dated January 31, 1990. Considering the circumstances, Williams and Boren knew that Complainant filed this claim, and they limited his privileges to hinder the lawsuit. Respondent has not shown that it would have taken these actions even if it had not taken Complainant's protected activity into account. *See Price Waterhouse*, 490 U.S. at 244-45.

ORDER

Accordingly, Respondent is ORDERED to offer Complainant reinstatement to the same or a comparable position to which he is entitled, with comparable pay and benefits, to pay Complainant the back pay to which he is entitled, and to pay Complainant's costs and expenses in bringing this complaint, including a reasonable attorney's fee. This case is hereby REMANDED to the ALJ for such further proceedings as may be necessary to establish Complainant's complete remedy.

SO ORDERED.

ROBERT B. REICH
Secretary of Labor

Washington, D.C.

[ENDNOTES]

[1] The evidence adduced in this case has been summarized by the ALJ at pages 2-40 of the R. D. and O.

[2] The Southern Company also owns Alabama Power Company and other utilities. T. at 61-62.

[3] Oglethorpe Power owns approximately 30% of Respondent's power plants, or "about a $4 billion investment, 3 percent in each of the four nuclear units." T. at 139, 852.

[4] I also reject Respondent's argument that it was prejudiced by irregularities that occurred during the Wage and Hour Division's investigation of the complaint. After a hearing was requested, the case received *de novo* review. The Wage and Hour determination was of no force or effect and was not legally prejudicial. *McClure v. Interstate Facilities, Inc.*, Case No. 92-WPC-00002, Sec. Dec., June 19, 1995, slip op. at 2-3.

[5] I note, however, that it was error for the ALJ to consider Respondent's proffered reasons for terminating Complainant in determining whether Complainant had established a *prima facie* case. See R. D. and O. at 52-53; *Moravec v. HC & M Transp., Inc.*, Case No. 90-STA-44, Sec. Dec., Jan. 6, 1992, slip op. at 11. An employer's reason for the adverse action goes not to the causal element of a *prima facie* case but to the ultimate question of whether Respondent retaliated against Complainant because he engaged in protected activity.

[6] The outline indicated that Complainant had urged McDonald to terminate Fuchko and Yunker in August 1988, after their protected activity, but that McDonald "vetoed" the request. Respondent's Exhibit (RX) 18, Tab 9. Complainant maintained that he recommended that Fuchko and Yunker be reassigned or released in April 1988, before their protected activity; that McDonald refused; and that he had no involvement with Fuchko and Yunker after June 1, 1988. T. at 77-78.

[7] According to Dahlberg, McDonald is "cantankerous." T. at 321. He is a strong personality who "stands up and . . . tells you what he thinks, he operates his plants well, and he puts it forth pretty straight to you." T. at 321, 337.

[8] Because I found other evidence sufficient to establish that Complainant engaged in protected activity on January 2, it was unnecessary to consider at that juncture whether counsel attempted to suborn Complainant to perjury. Even if counsel did, that evidence would not alter this decision.

[9] Smith explained:

> There is a requirement that whoever is the operating agent of a nuclear plant, that the upper management must be in charge -- totally in charge of what occurs at that nuclear plant, that there must be, in fact, a chain of command from essentially the CEO of the company that is the operating agent and holds a license to oversee, provide the resources, the guidance and direction to ensure that those plants are operated safely and legally.

T. at 849.

[10] Williams testified that Complainant's concern and Smith's concern were not the same. Smith credibly testified otherwise. Smith stated that he was concerned with whether Dahlberg managed the nuclear plants through the chain of command as required and whether he had control over McDonald. T. at 851. Smith also explained as follows:

> [The upper management of SONOPCO, including McDonald] are all triple headed. . . . They are employed as Georgia Power, SONOPCO, and Alabama Power which means that they work for all three companies simultaneously. This is a very difficult situation to be put in. . . . The issue and question here is [does] Mr. Dahlberg, who is CEO of Georgia Power, really have direct control over Mr. McDonald who wears three hats who has control over Mr. Harrison who wears three hats . . . et cetera.

T. at 850-51. Thus, the questions of who reports to whom and triple heading, which Williams referred to as Smith's primary concern, "are very tightly connected." T. at 883-84.

[11] Respondent's testimony regarding precisely who made the

initial recommendation, when, and to whom, is vague and conflicting, but most logically supports this pattern of events. *See* T. at 369, 372, 387, 392-95, 429-31, 407, 412, 485, 703.

[12] Complainant's direct supervisor at the time, Adams, did not testify.

[13] The ALJ erred in finding that Complainant designed NOCA as a means to stay in Atlanta. R. D. and O. at 40. Dahlberg testified that he established NOCA in Atlanta because that is where he is located. T. at 329.

[14] Respondent's evidence that two other positions were eliminated during this time is also unpersuasive. Those positions resulted from voluntary resignations. T. at 394.

[15] In addition, Williams confirmed that Complainant raised the issue with him several different times, not just in connection with the April 27 memo. T. at 421, 453.

[16] Farley testified that Baker asked him, "'[i]s there a place do you think for' or words to that effect 'for Mr. Hobby in the Southern nuclear organization?'" T. at 586. The question resembles Baker's remarks at the November 7 council meeting more than any request for a new position for Complainant.